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Supreme Court, U.S.
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No. 03-506

In the Supreme Court of the United States

CHRISTOPHER SPIERER; MARION SPIERER,
Petitioners,

v.

FEDERATED DEPARTMENTAL STORES, INC.;
ALLIED STORES CORPORATION;
BLOOMINGDALES DEPARTMENT STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR REHEARING

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INTRODUCTION

On December 8, 2003, this Court denied petitioners' petition for certiorari. The published decision of the US Court of Appeals for the 6th Circuit, concerned the scope of bankruptcy jurisdiction-- an area of law involving legislative courts which is replete with "arcane distinctions and confusing precedents".[1] In the present matter, the 6th. Circuit deemed waived, relevant jurisdictional statutes of Congress regulating bankruptcy judges, and applied its own test for jurisdiction. In their petition for certiorari petitioners showed that the writ was necessary to resolve conflicts within the Circuits and to maintain uniformity in the application of the Bankruptcy Code and the Anti- Injunction Act. These were not issues however, which this Court wished to address. Accordingly, petitioners hereby petition for a rehearing pursuant to Rule 44. 2 of the Supreme Court Rules. In support thereof, petitioners refer to other substantial grounds warranting a writ of certiorari, namely judicial infringement of congressional powers.

JUDICIAL INFRINGEMENT OF CONGRESSIONAL POWERS

At the start of debtor- respondent's Chapter 11 bankruptcy proceedings in 1990, bankruptcy judge Aug annulled further bankruptcy jurisdiction over petitioners' state actions to recover damages from debtor's insurer. Federal jurisdiction was initially created by debtors' bankruptcy, but the insurer's third party liability to petitioners was not part of debtors'

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[1] ***Northern Pipeline Construction Co. v Marathon Pipe Line Co.***, 458 US 50 at 90.

personal liability, or part of their Chapter 11 proceedings.(Cert. Pet. 28a, 29a).[2]

Accordingly there was no Federal bankruptcy jurisdiction over these state claims seven years later in 1997, (either by operation of the law or otherwise) which permitted another bankruptcy judge to exercise jurisdiction and stay the actions as "core proceedings" in Chapter 11 bankruptcy, "pursuant to 28 USC 157 or 1334". (Cert. Pet. 31a)

Petitioners' failure to object to the lack of jurisdiction in 1997 could not therefore re- confer or vest non- existent Chapter 11 bankruptcy jurisdiction over their state actions. Yet this was the finding of the 6th Circuit which stated that...."Their Motion to Lift the [judicial] Stay never suggests, for example, that the stay exceeded the bankruptcy court's statutory power under 11 USC Secs.105, 524, or 1141. Accordingly, the Spierers have waived the argument that imposing the stay violated the statutory restrictions." (Cert. Pet. 7a) [3]

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[2] The insurer's liability was not affected by debtors' subsequent discharge from Chapter 11 bankruptcy in 1992, since the latter were only nominal defendants in the state action. See, 11 USC 524 (e); ***In re Doar***, 234 BR 203, 204- 205.(N D Ga. 1999)

[3] In support of this approach, the 6th. Circuit merely referred to the general prohibition against raising new matters on appeal, citing ***Overstreet v. Lexington- Fayette Urban County Govt.***, 203 F 3d. 566, 578. (Cert. Pet. 7a) This prohibition, however, does not extend to jurisdictional issues. See ***Mitchell v. Maurer***, 293 US 237, 244. Further, the lack of jurisdiction over the state actions had already been determined in 1990.

The bankruptcy court "power" referred to by the 6th Circuit is dependent on, and flows from, specific statutory jurisdiction contained in 28 USC 157, upon which the 1997 bankruptcy judge relied. See, ***In re John- Manville Corp***, 801 F 2d. 60, 63 (2nd. Cir.).[4] In essence there is no substantive difference between, for example, Congressional diversity restrictions, contained in 28 USC 1332, and the restrictions relating to "cases under Chapter 11", contained in 28 USC 157. Both are premised on specific requirements of fact which are not capable of being waived or regulated by litigants.[5] In deeming that statutory restrictions in bankruptcy can be waived, the 6th Circuit placed in question the extent of Congress's authority to regulate the activity of bankruptcy judges.

Congress possesses plenary powers under Article 111, Section 2 of the Constitution to establish inferior Federal courts. This vests Congress with the authority to dispose of judicial power, or jurisdiction. See, ***Turner v. Bank of North America.*** 1799, 4 Dall.8, 10. Congress may therefore withhold or restrict the jurisdiction of inferior Federal courts on account of what it deems "proper for the public good".

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[4]The other jurisdictional ground relied on by the 1997 bankruptcy judge, namely, 28 USC 1334, is a general statute which vests Chapter 11 bankruptcy jurisdiction exclusively in the US District Courts.

[5] "Unlike an objection to venue, lack of Federal jurisdiction cannot be waived. An appellate Federal Court must satisfy itself not only of its own jurisdiction but also of that in the lower court in a case under review." ***Mitchell v. Maurer***, supra at 244.

See, ***Cary v. Curtis***, 1845 3 How. 236, 245. [6]

Originally Congress vested exclusive jurisdiction in bankruptcy proceedings in the inferior Federal District courts. See, 28 USC 1334 (a). In 1978 however, Congress sought to establish United States Bankruptcy Courts as separate courts of record, in each judicial district. See 28 USC 151 (a), (repealed). As such, Congress created bankruptcy judges with wide jurisdictional powers over civil proceedings arising under Chapter 11. Following this Court's decision in ***Northern Pipe Line Construction Co. v. Marathon Pipeline Co.***, supra, Congress withdrew such jurisdiction and limited it to "core proceedings" in bankruptcy, namely matters only concerning public rights created by Federal statute. See 28 USC 157 (b) (1), (2) (B)& (O); ***In re Royal***, 197 BR 341, 347- 348.

28 USC 157 was thus enacted by Congress as a jurisdictional statute, foreclosing certain aspects of bankruptcy judge jurisdiction. Although in its published decision the 6th Circuit does not challenge the constitutionality of 28 USC 157, restricting jurisdiction in Chapter 11 cases, it never the less effectively substituted its own test for those in 28 USC 157.

Under the constitutional separation of powers principle, the three branches of government are not simply separate and autonomous, but are enjoined to adhere to interdependence and reciprocity. See, ***Youngstown Sheet & Tube Co., et al. v. Sawyer***, 343 US 579, 635. The 6th Circuit's finding that

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[6] Subject only to due process requirements of the Fifth Amendment. See, ***Battaglia v. General Motors Corp.***,169 F. 2d. 254, 257 (1948, 2nd. Cir.)

congressional restrictions on bankruptcy judges may be waived and the substitution of its own test for jurisdiction violate both Congress's plenary powers to regulate such matters and the constitutional requirement of reciprocity. In addition, this finding opens the door to conferring *de facto*, Article 111 powers on such judges by waiver or direct agreement between the parties.

Petitioners' state actions against the insurer were clearly not within the congressional parameters of Chapter 11 proceedings as determined in 1990 by bankruptcy judge Aug. Moreover, since they were personal injury actions, they were not mattes which a bankruptcy judge could determine or refer to arbitration or authorize referral to the District Court for determination. See 28 USC 157 (b)(2)(B) & (O); 28 157 USC (c)(2).[7]

If the 6th Circuit, like bankruptcy judge Aug, had applied the congressional requirements for jurisdiction in Chapter 11 proceedings, including the specific requirements of 28 USC 157, it would clearly have found that there was no Federal subject matter jurisdiction in 1997 over Petitioners' state actions. Moreover, in 1997 Congress had not authorized the use of arbitration in bankruptcy proceedings nor, granted bankruptcy judges powers to authorize the referral of matters to the District Court for adjudication.

The test which the 6th Circuit devised for jurisdiction was far broader than the specific requirements enacted by Congress and included, *inter alia*, general considerations relating to the possible effect of the 1997 order on Petitioners'

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[7] See Pet. Cert. 34 a- 35 a, paras. 10 to 13 for the relevant portions of the 1997 Order.

state claims. (Pet. Cert. 12a - 13a). Such considerations were at best subjective, if not speculative, and overlooked important factors affecting the final outcome of such claims.

Specifically, in finding that the effect of the 1997 order on the state claim was " minimal" and therefore within the scope of bankruptcy jurisdiction, (Pet. Cert 12a - 13a), the 6th Circuit overlooked the following important factors:

a) The fact that the order provided no mechanism for the return of Petitioners' cases to the New York State courts. (Pet. Cit. 34a- 35a)

b) This Court's own views on the deleterious effects of delay on witnesses and evidence. See ***Clinton v. Jones***, 520 US 681, 707- 708

c) The imposed fees for the AAA arbitration procedures, and the draconian consequences for the state claims on Petitioner's inability to pay. (Pet. Cert. 35a, para. 14)[8]

d) The fact that ultimate forum of the Ohio District Court, has no connection with, and does not represent the vicinage or community in which the New York State personal injury claims arose.

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[8] In 1997 a US Administrative Judge found that Petitioners' medical conditions were linked to the chemical exposure allegedly caused by Respondents and that as a result, they were disabled. Petitioners accordingly receive a total monthly disability income of $2,154.

e) The fact that New York State Law is favorable to important aspects of petitioners' claims while Federal Law is not.[9]

REASONS FOR GRANTING REHEARING

Petitioners, Mr. and Mrs. Spierer, are just ordinary Americans who have been badly served by the administration of justice. Though this Court can no longer resolve all Federal cases and do justice to all litigants, it should not remain silent in this case. A serious Federal question arises from the 6th Circuit's approach to bankruptcy jurisdiction. Whether by error or design, the 6th Circuit's published decision calls into

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[9] The difference arises in the evaluation of expert evidence in a complex case such as Petitioners' which involves a toxic tort. New York State law does not follow the trilogy of Federal decisions on the interpretation of Federal Rule of Evidence 702, namely ***Daubert v. Merrell Dow Pharmaceuticals***, 509 US 579; ***General Electric Co. v. Joiner***, 522 US 136 and ***Kumho Tire Co. v. Carmichael***, 526 US 137. New York State has not adopted these cases but follows an earlier 1923 decision on expert evidence in ***Frye v. US***, 293 F 1013 (DC Cir.). The difference is material; under the ***Dauber, Joiner, Kumho*** trilogy, Federal judges act as "gatekeepers" for the admissibility of ***all*** expert testimony , including medical testimony. Under, ***Frye***, such "gatekeeper" activities are limited to a restricted class of ***scientific*** evidence. Since an important part of Petitioners' cases will turn on the expert testimony of medical doctors, Petitioners face a greater risk litigating in Federal courts than in the New York State courts. See "Trial Journal"; Association of Trial Lawyers of America, March 2001, p.19, 20. "*plaintiffs who litigate in federal court face expensive battles against long odds. Indeed, it is fair to say that **Daubert** has made trying cases in federal court a riskier and more expensive enterprise than at any time in the last 50 years.*" N. Miltenberg.

question the efficacy of Congressional regulation of Chapter 11 bankruptcy proceedings and creates uncertainty about the limits of bankruptcy judge jurisdiction.

The 6th Circuits' finding that statutory restrictions on bankruptcy judges can be waived will bedevil bankruptcy proceedings in the future until this Court is compelled to intervene. By that time much damage will have been done. By acting now, the chaos generated by this decision will be limited and petitioners may obtain some measure of redress. By taking up this important national issue, this Court can ensure that justice is afforded to ordinary citizens.

CONCLUSION

The petition for rehearing should be granted, and on rehearing a writ of certiorari should be issued.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

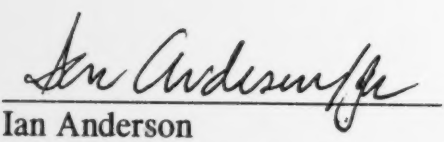
I, Ian Anderson, certify as follows:

1. I am the attorney for Petitioners in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial or controlling effect, or to other substantial grounds not previously presented.

3.This Petition is presented in good faith and not for the purpose of delay.

Dated December 29, 2003



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